

11 USC §547
Assignment- security v. absolute
ORS 79.3040

Bank of Eastern Oregon v. Bettis Adv. No. 87-0435-H
In re Brooks Case No. 386-06720-H7

BAP No. 89-1682-RMeO

10/9/90 BAP Affirm

unpublished

The BAP affirmed J. Hess's ruling that the Bank held a promissory note in escrow as a fiduciary and not as a creditor and that the assignment of the note was not absolute but was for security. Since the Bank had not perfected by filing and was not perfected by possession since it held the note only as a fiduciary, the assignment was avoidable under Section 547(b) and the Bank must turn over proceeds received during the 90 days preceding bankruptcy.

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

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OCT 09 1990

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OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re)	BAP No. OR 89-1682 RMeO
GREGORY D. and ORLA M. BROOKS,)	BK. No. 386-06720-H7
)	ADV. NO. 87-0435-H
Debtors.)	
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BANK OF EASTERN OREGON,)	
Appellant,)	
v.)	<u>MEMORANDUM</u>
WADE P. BETTIS, JR.)	
Bankruptcy Trustee,)	
Appellee.)	
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Argued and Submitted on
September 13, 1990 at Portland, Oregon

Filed - OCT 09 1990

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: RUSSELL, MEYERS, and OLLASON, Bankruptcy Judges.

1
2 I. FACTS

3 In 1983 the debtors, Gregory D. Brooks and Orla M. Brooks (the
4 Brooks) sold certain real property to Nicholas J. and Diane D. Welp
5 (the Welps) for \$285,000 cash and a \$115,000 promissory note
6 payable to the Brooks that was secured by a mortgage on the
7 property (Welp mortgage). The promissory note was deposited into
8 an escrow account at the Bank of Eastern Oregon (BEO), the
9 appellant. Under the escrow agreement BEO, as escrow agent, was
10 authorized to disburse funds received from the Welps to BEO to be
11 applied towards the Brooks' pre-existing loan with BEO.

12 On November 7, 1983, Gregory D. Brooks executed an assignment
13 all of his interest in the escrow. The assignment document does
14 not state to whom the assignment was made. On October 27, 1986,
15 the Brooks executed an assignment to BEO of their interests in the
16 Welp mortgage. Approximately \$88,627.46 remained owing on the land
17 sale contract at the time of the assignment.

18 The Brooks filed a Chapter 7 petition on December 15, 1986.
19 The Chapter 7 trustee/appellee filed an adversary proceeding
20 seeking to avoid the transfer of this interest pursuant to 11
21 U.S.C. § 547(b).¹ The bankruptcy court found that BEO held the
22 note as a fiduciary, not as a creditor and had failed to perfect
23 its security interest, therefore, BEO's interest may be set aside
24 and preserved for the estate pursuant to §§ 544 and 551. The court
25 ordered that the proceeds received on the Welp note by BEO

26
27 ¹ All code sections refer to Title 11 of the United States
Code unless otherwise indicated.

1 commencing with 90 days prior to the filing of the Brooks'
2 petition, \$127,618.88, be turned over to the Chapter 7 trustee.
3 BEO timely filed a notice of appeal from this order.

4 II. ISSUES

5 1. Whether the assignment of the interest in the Welps/Brooks
6 escrow by the Brooks to the Bank of Eastern Oregon was absolute or
7 an assignment for security for the debt the Brooks owed to the
8 bank.

9 2. Whether possession of the Welps/Brooks promissory note
10 perfected the banks security interest.

11 III. STANDARD OF REVIEW

12 Findings of fact are reviewed under the clearly erroneous
13 standard and conclusions of law are reviewed de novo. Ragsdale v.
14 Haller, 780 F.2d 794 (9th Cir. 1986); Bankr. R. 8013. A finding
15 of fact is clearly erroneous if the Panel, after reviewing the
16 evidence, is "left with the definite and firm conviction that a
17 mistake has been committed." Anderson v. City of Bessemer City,
18 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)
19 (quoting United States v. United States Gypsum Co., 333 U.S. 364,
20 395, 68 S. Ct. 525, 541-42, 92 L.Ed.2d 746 (1948)).
21 Interpretations of state law are reviewed de novo. Churchill v.
22 Fjord (Matter of McLinn), 739 F.2d 1395, 1397 (9th Cir. 1984) (en
23 banc).

24 IV. DISCUSSION

25 The bankruptcy court based its decision on the underlying
26 documents and the conduct of BEO. First, the court found that the
27 assignment was revocable because the escrow instructions could be
28 changed at any time upon the consent of the Brooks and the Welps.
Second, if the bank had intended an absolute assignment, it would

1 have credited the Brooks' account with \$115,000, the amount of the
2 note and cancel the note given by the Brooks to BEO. No such
3 credit was made and in fact, BEO stated that it would look to the
4 Brooks for payment if the Welps defaulted on the payments into the
5 escrow account. Since BEO held the note as a fiduciary rather than
6 as a creditor, the court reasoned, BEO could not assert that its
7 possession was for the purpose of perfecting its security interest.

8 The appellant, BEO, argues that the assignment was absolute
9 and irrevocable based on the intent of the parties and that its
10 possession of the note perfected its security interest. BEO admits
11 that "the October 27, 1986 assignment adds a mortgage conveyance
12 and is ineffective against the Trustee. But paragraph C of the
13 recitals shows that the parties previously intended a complete
14 assignment of the payments to the Bank", referring to the 1983
15 assignment of the Brooks interest in the escrow account.

16 A. Whether the bank held the Welps/Brooks Promissory Note
17 as an Escrow Agent or had Proprietary Possession.

18 Under Oregon law, a present and binding appropriation of an
19 interest in a specific fund is an assignment. Wakefield, Fries &
20 Co. v. Parkhurst, 84 Or. 483, 486, 165 P. 578 (1917). BEO argues
21 that the assignment of the Brooks interest in the escrow account
22 was absolute as of November 7, 1983 and that the November 27, 1986
23 assignment of the Brooks interest in the mortgage was to
24 memorialize and clarify the intent of the parties to the previous
25 assignment. The 1986 assignment of the mortgage payments to BEO
26 recites that it was made "to be applied to an outstanding debt of
27 the assignors to the bank totaling \$115,000.00 as of October 31,

1 1983 . . ." The 1983 assignment, which does not identify the
2 assignee, recites that in consideration of a commercial note in the
3 sum of \$115,000 the Brooks assign their interest in the escrow
4 between the Brooks and the Welps.

5 Additionally, the November 7, 1983 summary of the Brooks'
6 account with BEO shows a "\$115,000.00 loan secured to Escrow with
7 N. Welp." As noted by the bankruptcy court, nowhere in BEO's
8 records is there a credit of the \$115,000 to the Brooks account to
9 support BEO's position that it took an absolute assignment of the
10 interest in the \$115,000 debt.

11 The 1983 escrow agreement itself lists the parties as the
12 Brooks and the Welps. The Welps agreed to pay to the order of the
13 Brooks, not BEO, the balance of the purchase price. BEO's role in
14 the escrow was as a disbursing agent:

15 You are authorized to disburse the funds received as
16 follows:

17 To the Bank of Eastern Oregon to apply towards Sellers'
18 loan with said Bank.

19 These escrow instructions shall be irrevocable, including
20 the disbursement provisions set forth above and may not
be altered, modified or changed in any way without the
written consent of the Sellers and Buyers first being
obtained.

21 In other words, the parties to the escrow agreement could change
22 the escrow instructions without the consent of BEO, which is also
23 inconsistent with an absolute assignment.

24 BEO admits that if the Welps defaulted on payments into the
25 escrow account, they would look to the Brooks for payment. This
26 position is inconsistent with BEO's claim of absolute assignment:

27 It is true that, in the case of a total assignment "as
28

1 security," the grantor or assignor still has an
2 "interest" to be protected; but analysis shows that it
3 is secondary and inferior to that of the assignee. It
4 no longer includes any presently enforceable right to the
5 performance promised by the obligor. It is the assignee
6 alone who has that enforceable right; and it is now the
7 assignee to whom the obligor is legally bound to pay
8 every dollar included in the assignment.

9 4 Corbin on Contracts § 891 (Supp., 1990). If the Brooks had
10 absolutely assigned all of their interests in the payments on the
11 Welps mortgage, then BEO would have to pursue the Welps in the
12 event of their default. The effect of an absolute assignment of
13 the interests in the mortgage payments would have extinguished any
14 rights the Brooks had to payment from the Welps and the Brooks
15 would not be a necessary party to an action to enforce the mortgage
16 payments. See e.g., Morton v. Thornton, 259 N.C. 697, 131 S.E.2d
17 378 (1963); National Motor Service Co v. Walters, 85 Idaho 349, 379
18 P.2d 643 (1963); Westville Land Co. v. Handle, 112 N.J.L. 447, 171
19 A. 520 (1934); Lincoln Nat. Life Ins. Co. v. Scales, 62 F.2d 582
20 (5th Cir. 1933).

21 BEO claims that the bankruptcy court erred in failing to
22 distinguish between absolute assignment and assignment for
23 security. However, BEO fails to define these terms or show
24 specifically what differentiates these besides the intent of the
25 parties. BEO repeatedly makes the argument that the court erred
26 in failing to consider the testimony of the parties as to their
27 intent in these transactions ignoring the apparent conclusion of
28 the court that the conduct of the bank and the underlying documents
were more indicative of the true intent of the parties. The
bankruptcy court did not fail to ascertain the intent of the

1 parties, it merely disagreed with the intent with which BEO
2 characterizes these transactions.

3 Based on our review of the record, we cannot conclude that the
4 bankruptcy court's findings of fact were clearly erroneous,
5 therefore, we affirm its finding that the assignment was only for
6 the purpose of providing security for the debt owed by the debtor
7 to the bank.

8 B. The Bank's Possession of the Welps Promissory Note
9 Did Not Perfect it's Security Interest.

10 BEO claims that it perfected its security interest in the
11 Welps note by possession pursuant to ORS 79.3040 which provides:

12 (1) A security interest in chattel paper or negotiable
13 documents may be perfected by filing. A security
14 interest in money or instruments (other than certificated
15 securities or instruments which constitute part of
16 chattel paper) can be perfected only by the secured
17 party's taking possession, except as provided in
18 subsections (4) and (5) of this section and ORS
19 79.3060(2) and (3) on proceeds.

20 In Security Bank v. Chiapuzio, 304 Or. 438, 747 P.2d 335 (Or.
21 1987) (en banc), the Oregon Supreme Court held that assignment for
22 security of a vendor's interest in a land sale contract is subject
23 to the filing requirements of Article 9 of the UCC and therefore
24 required to be recorded under ORS 79.1010 to 79.5070. In that
25 case, the bank had acquired the vendor's interest in a land sale
26 contract and the property itself as collateral for a loan to the
27 vendor. The Chiapuzio court differentiated between an interest in
28 the land and an interest in the land sale contract. The bank did
not file notice of its security interest as required by Article 9
and the court subordinated the bank's security interest.

The bankruptcy court found that BEO's possession of the

1 Welps/Brooks note did not perfect its security interest because it
2 held the note only as the escrow agent. ORS 79.3050 provides:

3 When possession by secured party perfects security
4 interest without filing.

5 A security interest in letters of credit and advices of
6 credit as provided in ORS 75.1160(2)(a), goods,
7 instruments (other than certified securities), money,
8 negotiable documents or chattel paper may be perfected
9 by the secured party's taking possession of the
10 collateral.

11 We agree with the bankruptcy court's conclusion that BEO's
12 possession alone did not perfect it's interest in the Welps/Brooks
13 note. The bank's possession of the note as the escrow agent does
14 not place it in the same position as that of creditor in
15 possession. Had the Welps and Brooks used an escrow agent outside
16 of the bank, BEO would still have to meet the Article 9
17 requirements for perfection. The fact that the parties did use BEO
18 as the escrow agent does not relieve BEO from having to meet these
19 requirements.

20 We affirm the finding of the bankruptcy court that BEO failed
21 to perfect its security because it held the note as a fiduciary,
22 not as a creditor.

23 V. CONCLUSION

24 The assignment to BEO of the Brooks interest in the payments
25 from the Welps was an assignment made for the purpose of securing
26 the debt that the Brooks owed to BEO. BEO, as the escrow agent,
27 held the Welps/Brooks note as a fiduciary, therefore, BEO's
28 possession did not perfect it's security interest under Article 9
of the UCC as required under Oregon law.

AFFIRMED.